APPEAL NO. 010099

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 15, 2000. With respect to the single issue before her, the hearing officer determined that the appellant (carrier) is liable for spinal surgery. In its appeal, the carrier contends that the hearing officer erred in determining that the respondent's (claimant) second opinion doctor concurred in the proposed spinal surgery and determining that there were two opinions in favor of surgery which were entitled to presumptive weight because the great weight of medical evidence was not contrary to those opinions. In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, which included an injury to his cervical spine. Dr. P submitted a Recommendation for Spinal Surgery (TWCC-63) recommending a cervical discectomy, fusion, partial corpectomy, and plating. In the narrative report dated the same date as the TWCC-63, Dr. P noted that the claimant's cervical MRI revealed protruding discs at C4-5 and C5-6 with spondylosis, degenerative disc disease, and facet arthritis and explained that he was recommending that the claimant undergo "cervical diskectomy and fusion, anterior approach with possible partial corpectomy to release the pressure in the spinal canal, interbody fusion and possible use of plating at two levels. On October 11, 2000, Dr. K, the carrier's spinal surgery second opinion doctor, examined the claimant. In a report of the same date, Dr. K stated that he disagreed with the proposed surgery, recommending instead that the claimant undergo epidural steroid injections. Dr. T was selected by the claimant to serve as his second opinion doctor. In a report dated November 7, 2000, Dr. T stated "I believe this patient would benefit from a cervical discectomy and fusion as proposed by [Dr. P]. Therefore, I do agree with the cervical fusion." Dr. T also completed a Spineline Fax Response Form, indicating that he agreed that the recommended procedure is needed.

In a November 21, 2000, letter, the Texas Workers' Compensation Commission's Medical Review Division sent a letter to the claimant advising him that if the carrier does not appeal, it will be liable for the cost of spinal surgery because one of the second opinion doctors agreed with Dr. P's recommendation for spinal surgery.

In a December 12, 2000, letter to the carrier's attorney, Dr. P explained that a "partial corpectomy consists of some removal of bone from the body of C4-C5 and C5-C6 levels and diskectomy at two levels with fusion at C4-C5 and C5-C6 through anterior approach." On December 11, 2000, the carrier sent a letter to Dr. T asking him to answer certain questions. Specifically, the carrier asked Dr. T if he concurred that the claimant "needs a discectomy at one or two levels and, if so, which levels." Dr. T responded that

the claimant needed a discectomy at two levels, C4-5 and C5-6. The carrier also asked if the claimant needed a "fusion at one level or two levels, and if so, which levels." Dr. T replied that the claimant needed a fusion at two levels, C4-5 and C5-6. Dr. T also stated that an anterior approach, as opposed to a posterior approach, should be used in performing the cervical surgery. The carrier also asked if Dr. T concurred with the recommended partial corpectomy; however, Dr. T did not provide a response to that question.

In Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) the term "concurrence" is defined as follows:

> A second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e. cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention. Types of spinal surgery include but are not limited to: stabilizing procedures (e.g. fusions); decompressive procedures (e.g. laminectomy); exploration of fusion/removal of hardware procedures; and procedures related to spinal cord stimulators.

Rule 133.206(k)(4) provides that of the three recommendations and opinions, those of the surgeon and the two second opinion doctors, presumptive weight will be given to the two which have the same result and that their result will be upheld unless the great weight of the other medical evidence is to the contrary.

The hearing officer determined that the spinal surgery should be approved because Dr. T concurred in the proposed surgery and the great weight of the other medical evidence was not contrary to the two opinions in favor of surgery. In its appeal, the carrier contends that Dr. T's opinion was improperly characterized as a concurrence because he did not concur in the proposed partial corpectomy. That is, the carrier maintains that the partial corpectomy is a type of spinal surgery and that, as such, Dr. T had to concur with that recommendation in order to qualify as a concurrence under Rule 133.206(a)(13). We cannot agree that the corpectomy is a type of spinal surgery with which the second opinion doctor had to agree in order for his agreement with the surgery to be considered a concurrence under Rule 133.206(a)(13). From Dr. P's explanation of the partial corpectomy, it appears that Dr. T's disagreement with the proposal to perform a partial corpectomy, if indeed his silence on the issue were to be considered a disagreement, is more in the nature of a disagreement as to the approach (anterior, posterior, instrumentation, cages, etc.) or on the number of levels within the region in which the recommended surgery will be performed. Thus, his disagreement with that aspect of Dr. P's recommendation would not make his opinion a nonconcurrence. It is apparent that Dr. T concurs with Dr. P's recommendation to perform a cervical discectomy and fusion. As a result, we cannot agree with the carrier's assertion that the hearing officer erred in

determining that Dr. T's report was a concurrence within the meaning of Rule 133.206(a)(13).

As noted above, pursuant to Rule 133.206(k)(4), presumptive weight is given to the two opinions that reach the same result, unless the great weight of the other medical evidence is to the contrary. The hearing officer determined that the great weight of the other medical evidence was not contrary to the opinions from Dr. P and Dr. T that the proposed type of surgery was indicated; thus, she further determined that the surgery should be approved. Our review of the record does not demonstrate that the hearing officer's decision in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge